SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SIDNEY J. GEFEN prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 29, 1968.*

*Lois Gefen, although an appellant below, is not involved directly in the limited question here presented.

Reference to Opinions Below

The judgment of the District Court (R 65), printed in Appendix B hereto, *infra*, pp. 19-20, is not officially reported. The Findings of Fact and Conclusions of Law of the District Court (R 51-58) is reported in 18 AFTR 2d 5552. The opinion of the United States Court of Appeals, printed in Appendix B hereto, *infra*, pp. 4-16, is reported in 400 F.2d 476.

Jurisdiction

The judgment of the United States Court of Appeals (R 684), printed in Appendix B hereto, *infra*, p. 17, was entered on August 29, 1968. Rehearing was denied (R 690) on September 24, 1968. Appendix B, *infra*, p. 18. The jurisdiction of this Court is conferred by 28 U.S.C., § 1254 (1).

Question Presented

The government brought a civil action against a taxpayer to (1) reduce federal tax claims to judgment, and (2) foreclose the tax lien against the property of the taxpayer, alleging a 100% penalty assessment under the Internal Revenue Code and the refusal of the taxpayer to pay the assessment. The government asked the court to adjudge (1) that the taxpayer was indebted to it in the sum of $40,273.25, plus interest; (2) that it had a valid lien against the property of the taxpayer; and (3) that the federal tax lien be enforced against property of the taxpayer. The taxpayer denied each of the government's said allegations and timely demanded a jury trial. The question presented is whether in these circumstances the taxpayer is entitled to a jury trial.

Constitutional Provision and Statutes Involved

Amendment VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The statutory provisions involved are Sections 6671, 6672, 7403(a) and (c) and 7501, Internal Revenue Code, 1954, 68A Stat. 828, 26 U.S.C. §§ 6671, 6672, 7403(a) and (c) and 7501. They are printed in Appendix A, *infra*, pp. 1-3.

Statement

The United States of America filed a complaint in the United States District Court for the Middle District of Florida against Sidney J. Gefen, Lois Gefen and Prudential Insurance Company of America (R 7-11) March 10, 1964. The jurisdiction of the District Court was invoked under 28 U.S.C., §§ 1340 and 1345 and under the Internal Revenue Code of 1954. The District Director of Internal Revenue made a 100% penalty assessment under the Internal Revenue Code arising out of the withholding and F.I.C.A. tax liabilities of Georgia Shipbuilding Corporation in the amount of $47,991.17 for certain taxable quarters (R 9). Although the District Director gave petitioner notice of this assessment and made a demand for its payment, petitioner refused to pay the balance outstanding in the amount of $40,273.25 (R 9). The United States, in its complaint, sought a personal money judgment against the petitioner (R 10). Petitioner's answer filed October 9, 1964, denied the allegations of the government's complaint (R

13) and demanded a jury trial (R 15). The government, on August 9, 1965, moved to strike the demand for jury trial (R 15) and its motion was granted September 8, 1965 (R 16-17), on the authority of *Damsky* v. *Zavatt*, 289 F.2d 46. The District Court, sitting without a jury, tried the case on July 25, 1966, entered its findings of fact and conclusions of law August 5, 1966 (R 51-58), denied all post-trial motions (R 64) and entered judgment for the United States on October 27, 1966 (R 65-66).

The Court below affirmed. However, in referring to and indicating its dislike for the decision in *Damsky*, the court said:

> "And although the ossification of pre-1791 standards does not capture our unqualified enthusiasm, we follow *Damsky* until the Supreme Court frees us from its validated historical bondage.[5]"

App. B, *infra*, pp. 8-9.

In addition, marginal note 5 contained in the opinion of the United States Court of Appeals, Appendix B, *infra*, p. 9, outlines the basis for such dislike for *Damsky*.

Reasons Relied On for the Allowance of the Writ

1. The decisions of the court below in the instant case and in *Damsky*, upon the authority of which the instant case was decided, are directly in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *U. S.* v. *Strebler*, 313 F.2d 402. Neither this conflict nor the *Strebler* decision was mentioned by the court below. And, to some extent at least, the decision of the court below in the instant case itself conflicts with *Damsky* upon which it relied for affirmance.

In the *Gefen* opinion the court below recognized that the foreclosure of the federal tax lien was only part of the

judgment of the District Court, Appendix B, *infra*, p. 5. But, it fell short in not acknowledging that the largest part of the judgment was a personal money judgment against petitioner, Appendix B, *infra*, p. 20, with a small incidental foreclosure blended in. In *Damsky*, a jury trial was granted with regard to so much of the complaint as sought a judgment against Bernard Damsky for taxes, penalties and interest for which he was solely liable, holding that the action was for a money judgment and nothing more. This precisely was the government's case and technique in the instant case.

While *Strebler* specifically acknowledged the jury trial in an identical proceeding, the conflict, it is true, is subjective to the extent that the government apparently did not there raise the issue.

Consequently, the three decisions, *Damsky*, *Strebler* and *Gefen*, while triangulating the problem, confuse the isolated constitutional question and make it difficult, if not impossible, for the American taxpayer to determine in which jurisdiction he is entitled to a jury trial. The tremendous importance of this principle lies in the problem of the taxpayer's deciding whether to pay an assessment believed to be invalid and sue for a refund in order to have his jury, or to refuse to pay the assessment and await the complaint of the government, depending upon which circuit is involved. Thus, a financially poor taxpayer may effectively be denied his jury in either case.

It is respectfully suggested that the Supreme Court take jurisdiction here and resolve those doubts one way or the other, in order that there will be uniformity of the collection process and administration of the laws throughout the United States.

Perhaps the most impelling reason for allowing the writ is to disapprove further use by the government of the technique of blending a small but ostensibly equitable claim to the real legal claim for the purpose of denying the [redacted] mination of those legal factual issues, i.e., the truth of the claim of taxes owing as well as the validity of the assessment in the first place and the issues of responsibility and willfulness.

2. Clearly, the question presented is of importance in the administration of the federal tax laws which has not been, but should be, settled by the Supreme Court. Indeed, in the *Gefen* case the court below observed, Appendix B, *infra*, p. 9:

> "[5]The absolute reliance in *Damsky* on historical precedent has clearly produced a non-functional result in that, as has been pointed out by a student commentator, 'it denies the taxpayer who owns property a right to a jury trial, while the taxpayer who has no property is granted this right.' Note, 46 Minn. L. Rev. 643, 651 (1962)."

Settlement of the question by this court is principally in the public interest since it is likely to be presented in almost every civil action brought by the government to enforce a penalty assessment, including those now pending, and may very well involve every tax claim of the government because of the language of lien provisions of the tax law.

3. The decision of the court below is believed to be erroneous and the subtle approval of the jury trial in *Strebler* is believed to be correct. Moreover, the decision below probably conflicts with *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 and *Dairy Queen, Inc.* v. *Wood*, 1962, 369 U.S. 469, 82 S.Ct. 894,

8 L.Ed.2d 44. We have clearly isolated the constitutional issue by demonstrating that the technique of the government is to impair the Seventh Amendment right by blending with its claim for a money judgment a demand for equitable relief in aid of the legal action. In *Beacon Theatres*, this Court, quoting from its opinion in *Scott* v. *Neely*, 140 U.S. 106, 109-110, 11 S.Ct. 712, 714, 35 L.Ed. 358, expressly condemned such strategy.

4. The decision below so far sanctions a departure by the federal trial judges from the accepted and usual course outlined by this Court recently in *Beacon Theatres* and *Dairy Queen*, as well as other decisions, so that petitioner believes that it is clearly apparent that there has been a departure from the essential requirements of law. The action of the District Court denied a fundamental right. Under the decision of the court below federal trial judges at the sole choice of the government can go in either of three directions, i.e., following *Gefen* on the one hand, *Damsky* on the other, or *Strebler* on still another. In addition, the government now has an unfair advantage over the taxpayer who has property as opposed to the one who does not. This non-uniformity in constitutional application and administration of federal tax law is wrong fundamentally. It exists also without regard to the value of the property although it may be minuscule in relation to the amount of the penalty assessments and the personal judgment sought.

Further, since this Court has held that it is within the undoubted power of Congress to provide any reasonable system for the collection of taxes, without a jury trial, *Wickwire* v. *Reinecke*, 275 U.S. 101, 48 S.Ct. 43, 72 L.Ed. 184, the denial of a jury in such cases should be left to the legislature.

The burden was on the taxpayer to show that he did not owe the taxes which were assessed against him, *C.I.R.*

v. *Hansen*, 360 U.S. 446, 79 S.Ct. 1270, 3 L.Ed.2d 1360. Whether or not the taxes were owed and validly assessed was challenged in petitioner's answer, clearly raising an issue of fact, the determination of which was an absolute essential to support the personal money judgment. That this was a "common law" legal issue of fact is most clearly and simply demonstrated by the language chosen by the framer of the government's complaint, where it prays that the trial court adjudge that petitioner is "indebted" to the United States in a sum certain (R 10). Consequently, rather than *Damsky*, this Court's decision in *Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691, is controlling in the instant case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the writ allowed.

Respectfully submitted,

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